

Tax Chamber
First-tier Tribunal for Scotland



[2024] FTSTC 9

Ref: FTS/TC/AP/24/0011

Land and Buildings Transaction Tax – Sections 159, 160 and 161 of Revenue Scotland and Tax Powers Act 2014 – Procedural irregularity? – the Revenue Scotland and Tax Powers Act 2014 (Amendment) Regulations 2020 – reasonable excuse or special circumstances for failure to make a return

DECISION NOTICE

IN THE CASE OF

Troon Welbeck Golf Club

Appellant

- and -

Revenue Scotland

Respondent

**TRIBUNAL: PAUL DOYLE
LOUISE CARLIN**

The Tribunal determined the appeal on 2 December 2024 without a hearing under the provisions of Rule 27 of The First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 having first read the Notice of Appeal, and attachments, dated 10 May 2024 and Revenue Scotland's Statement of Case, and attachments, received by the Tribunal on 27 June 2024, the appellant's response thereto dated 5 August 2024 and Revenue Scotland's amended Statement of Case received by the Tribunal on 26 August 2024.

DECISION

1. The Appellant is Troon Welbeck Golf Club, a private members' club, with its correspondence address at Harling Drive, Troon, South Ayrshire, KA10 6NF ("the Property").
2. The Respondent is Revenue Scotland, a non-Ministerial Office established as a body corporate under section 2 of the Revenue Scotland and Tax Powers Act 2014 ("RSTPA"). The Respondent is responsible for the collection and management of Land and Buildings Transaction Tax ("LBTT").
3. This is an appeal against a decision of the Respondent to issue penalties to the Appellant under sections 159, 160 and 161 RSTPA. The Respondent issued a Penalty Assessment Notice to the Appellant in a letter dated 1 February 2024.
4. Both parties ask us to decide this appeal on the documentary evidence only.

Findings in Fact

5. The Appellant is a private members club.
6. On 24 May 2017, the Appellant entered into a 10-year lease for the Property. They submitted a LBTT return on 26 May 2017. No tax was due on the transaction.
7. Paragraph 10(1)(a) of Schedule 19 LBTTA applies to the lease.
8. Under paragraph 10, the Appellant must make a further return to the Respondent if, on a review date, the lease has not been assigned or terminated. The return must be not later than 30 days counting from the day after the review date. The "review date" is defined in sub-paragraph (7) as the day falling on the third anniversary of the effective date of the transaction and on each subsequent third anniversary of that date.
9. The effective date of the original lease transaction for the property was 24 May 2017. The Appellant's first review date was 24 May 2020, and the first three year lease review return was due by 23 June 2020.
10. The Respondent did not issue any penalties for failure to make a return for the first review for the Property because the Respondent suspended all penalties during the Covid-19 pandemic. The suspension decision covered the period from 23 March to 30 November 2020.
11. The second review date for the lease of the Property was 24 May 2023, so that the Appellant's second three year lease review return was due by 23 June 2023.
12. On 28 April 2023 and 5 May 2023 the Respondent sent lease review reminder letters to the Appellant at their business address (which is the property). Those letters told the Appellant that a tax return was due for the Property by 23 June 2023. The letters explained that the Appellant must submit a lease review return to the Respondent every three years, even if nothing has changed and no tax was due. The letter also advised that if the return was late, the Appellant may be charged a £100 late filing penalty and that returns more than three months late would be charged at £10 per day for up to 90 days (ie up to a maximum of £900).

13. The Respondent's letters were addressed to "The Occupier" at the Property. The Property has three separate tenants. The Appellant has no recollection of receiving the letters and thinks they might not have been delivered to them.

14. On 1 February 2024, the Respondent issued a penalty assessment notice to the Appellant in respect of the Property. The notice contained two penalties:

(i) A £100 penalty for a failure to submit a return on time under sections 159 and 160 RSTPA.

(ii) A £900 penalty for failing to submit a return after three months under sections 159 and 161 RSTPA.

The second penalty was a daily rate penalty of £10 for 90 days.

15. On 9 February 2024, the Appellant submitted a three year lease review return for the Property. No tax was payable.

16. On 9 February 2024, the Appellant emailed the Respondent to request a review of the penalties raised.

17. On 16 April 2024, the Respondent issued its review conclusion letter to the Appellant. The Respondent adhered to the original decision to issue penalties.

18. On 10 May 2024, the Appellant appealed the penalty assessment notice dated 1 February 2024.

The area of dispute

19. In their Notice of Appeal, the Appellant says:

"While the Appellant does not believe that the decision was wrong on the failure to submit the required return, we believe that there are mitigating circumstances that led to this. Troon Welbeck Golf Club does not own our Clubhouse or Golf Courses, we have a Landlord South Ayrshire Council to whom we pay rent for our Clubhouse and the Golf Courses that our Members play over are managed by Golf South Ayrshire.

Troon Welbeck Golf Club is run by volunteers who give their time freely to form a Committee to run the Club for its Members, and the oversight of non submittal of the relevant information is down to the Club recovering from the enforced closure due to the Covid Pandemic and the retirement of our Treasurer, this placed an extreme burden on the remainder of the Committee to cover the duties that are undertaken by that role.

While we apologise for the non submission of the relevant document it has to be noted that we do not qualify for payment of LBTT as our lease falls below the rateable level.

We would ask that our appeal be reconsidered and looked at in a sympathetic way, we are small Golf Club with 250 Members ranging from Very Young Juniors, Ladies, Seniors and Gents Members, which when we collect our Annual Membership Fees which is our main source of income at the start of our golfing year which are in the region of £45k this has to last or our Membership Year and cover our outgoings (sic).

The amount of the fine we believe is not representative, if the fine is to upheld at its current level this will bring considerable hardship to our Club and would put an extra burden on our Members.”

20. The Respondent says that the Appellant cannot establish a reasonable excuse for failure to make a return for the purposes of section 178 RSTPA, nor does the Appellant establish special circumstances which would justify a reduction in the amount of penalties due.

The Law

21. The relevant law is contained in sections 159, 160 and 161 of RSTPA.

Analysis

22. There is little dispute about the facts of the case. The Appellant says there has been procedural irregularity. The Appellant says that they have been treated unfairly and if the Respondent had issued a correctly addressed reminder they would have made the lease review return on time. The Appellant says the fine is disproportionate.

23. The Appellant submitted a return for the Property on 9 February 2024. The return was submitted over seven months late. Both sections 159 and 160 apply.

24. The Appellant’s appeal proceeds almost entirely on an argument that the Respondent has a duty to send them a reminder before a lease review return is due. There are two problems with that argument:

- (i) It has no foundation in law.
- (ii) The Respondent has established that reminder letters were sent on 28 April 2023 and 5 May 2023.

25. Section 161 RSTPA provides that if a failure to make a return continues after the end of the period of three months after the month beginning with the penalty date, a person is liable for a further penalty of £10 for each day that the failure continues during the period of 90 days beginning with the day after the end of the period described in section 161(1)(a).

26. The Appellant’s failure to submit a return continued beyond the three month section 161(1)(a) period. The Appellant is liable to a penalty of £10 per day for the period beginning with the day after the end of the section 161(1)(a) period; being £900 in total.

27. The Revenue Scotland and Tax Powers Act 2014 (Amendment) Regulations 2020 deal with failure to make a tax return where the filing date occurs on or after 11 March 2020 (item 1 of the table in section 159 RSTPA). The effect of the Regulations is that there is no need for a notification to be made under section 161 before an assessment can be

made under section 179.

28. The only competent arguments left to the Appellant are:

- (i) Reasonable excuse; and
- (ii) Special circumstances.

Reasonable Excuse

29. Section 178 RSTPA provides that if a person satisfies the Respondent that there is a reasonable excuse for failing to submit a return, liability to a penalty does not arise.

30. The Appellant says lack of communication from the Respondent led to the penalty notices because the Appellant only became aware of the late filing in February 2024, after receipt of the penalty assessment notice. The Appellant says that if they had been contacted the return would have been completed and submitted on time.

31. On the facts as we find them to be, two reminder letters were issued by the Respondent. The letters were addressed to “The Occupier” and not, directly, to the Appellant. The Appellant might not have received the reminders.

32. Whether or not the Appellant received reminders is irrelevant. LBTT is a self-assessed tax. The Respondent is not required to notify a taxpayer of their responsibility to submit a tax return. The Appellant does not have a reasonable excuse for failing to submit the returns on time.

33. Section 178(3)(b) RSTPA stipulates that reliance on a third party cannot be a reasonable excuse unless the Appellant took reasonable care to avoid the failure. The Appellant did not produce sufficient reliable evidence of reasonable care to avoid the failure.

34. In their notice of appeal, the Appellant accepts responsibility for the late submission of the three year lease review return and says that the Respondent’s decision to issue a penalty notice is not wrong. It is only in their letter of 5 August 2024 that the Appellant introduces an argument that the Respondent’s reminders were incorrectly addressed.

35. The Appellant does not establish reasonable excuse.

Special circumstances

36. Section 177 RSPTA permits the Respondent to reduce a penalty if it thinks it is right to do so because of special circumstances.

37. The Appellant says they face a financial penalty because of confusion caused by a change in office bearers, and implies that they will suffer financial hardship if they have to pay the full penalty. The true focus of the Appellant’s argument is that the level of penalty is harsh and disproportionate. The Appellant wants, at least, a reduction in the level of penalty.

38. Like reasonable excuse, special circumstances is not defined in RSTPA.

39. In a House of Lords decision dealing with special circumstances in the Finance Act

1965, Lord Reid in *Crabtree v Hinchcliffe (Inspector of Taxes)* 1971 3 All ER 967 said:

“Special must mean unusual or uncommon - perhaps the nearest word to it in this context is ‘abnormal’”.

40. The expression “special circumstances” was considered in relation to employment law in the decision of the Court of Appeal in *Clarks of Hove Limited v Bakers Union* 1978 1 WLR 1207 in which Jeffrey Lane LJ said [at 1216]:

“What, then is meant by ‘special circumstances’? Here we come to the crux of the case ... In other words, to be special the event must be something out of the ordinary, something uncommon; and that is the meaning of the word ‘special’ in the context of this Act”.

41. More recently, the meaning of the expression “special circumstances”, in Schedule 24 Finance 25 Act 2007, was examined by the Tribunal in *Collis v HMRC* [2011] UKFTT 588 (TC) in which the Tribunal said [at 40]:

“To be a special circumstance the circumstance in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the schemes or provisions themselves”.

42. We agree.

43. None of the circumstances set out by the Appellant are either unusual or uncommon.

44. Further, section 177(2)(a) of RTSPA provides that “special circumstances” do not include an inability to pay.

45. In *Straid Farms v Revenue Scotland* [2017] FTSTC 2 [at 64], this Tribunal was of the view that special circumstances encompass a situation in which it would be significantly unfair to the taxpayer to bear the whole penalty.

46. In *HMRC v Total Technology* 2012 UKUT 418 (TCC) the Upper Tribunal stated [at 74]:

“We turn then to the question whether proportionality is to be assessed at a high level, that is to say whether it is correct to view the default surcharge regime as a whole, recognising the possibility of its producing, in some cases, a disproportionate and possibly entirely unfair result; or whether proportionality is to be assessed at an individual level by asking whether the penalty imposed on a particular taxpayer on the particular facts of its case is disproportionate.”

47. The Upper Tribunal went on to say [at 76] that:

“Even if the structure of the surcharge regime is a rational response to the late filing of returns and the late payment of VAT, it is, nonetheless necessary to consider the effect of the regime on the particular case in hand. It is necessary to do so not least because ... a penalty must not be disproportionate to the gravity of the infringement ...”.

48. We are not concerned here with the penalty scheme as a whole but rather confine ourselves to looking at the penalty at an individual level.

49. In circumstances in which the Appellant submitted a return for the Property over seven

months late, and consequent to two reminder letters issued by the Respondent, we do not find the individual penalty to be disproportionate when judged against the objective of the relevant legislative provisions to ensure timeous returns.

50. We do not find the penalty imposed, in these circumstances, to be harsh and unfair nor an excessive burden.

51. More generally, it is well established that the Tribunal's jurisdiction and powers are only those that are given to it expressly by statute and that it does not have jurisdiction to consider issues of fairness in determining the matter in question.

52. Section 244(2) RSTPA provides that:-

"The Tribunal is to determine the matter in question and may conclude that Revenue Scotland's view of the matter in question is to be:-

- (a) Upheld,
- (b) Varied, or
- (c) Cancelled."

53. In *HMRC v Hok* [2012] UKUT 363 (TCC) the Upper Tribunal reiterated that the First-tier Tribunal's jurisdiction is limited to those functions conferred on it by statute. At [56-58] of that decision the Upper Tribunal said:

"56. Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction. As we explain at paras 36 and 43 above, the Act gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier Tribunal's jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct.

57. If that conclusion leaves 'sound principles of the common law ... languishing outside the Tribunal room door', as the judge rather colourfully put it, the remedy is not for the Tribunal to arrogate to itself a jurisdiction which Parliament has chosen not to confer on it. Parliament must be taken to have known, when passing the 2007 Act, of the difference between statutory, common law and judicial review jurisdictions. The clear inference is that it intended to leave supervision of the conduct of HMRC and similar public bodies where it was, that is in the High Court, save to the limited extent it was conferred on this Tribunal.

58. It follows that in purporting to discharge the penalties on the ground that their imposition was unfair the Tribunal was acting in excess of jurisdiction, and its decision must be quashed. The appeal is allowed and we determine that all five of the penalties are due."

54. In *Dr Goudie and Dr Sheldon v Revenue Scotland* [2018] FTTSC 3, this Tribunal,

having quoted as above from the Upper Tribunal in *HMRC v Hok* found [at 67] that “This Tribunal does not have jurisdiction to consider...fairness.”

Decision

55. The appeal is dismissed

56. The Respondent’s penalties (under sections 159, 160 and 161 RSTPA) issued in an Assessment Notice to the Appellant on 1 February 2024 are confirmed.

Right of Appeal

57. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

PAUL DOYLE
Legal Member

RELEASE DATE: 5 December 2024